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April 15, 1997

BY HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: In re Petition of MCI for Declaratory Ruling
CCBPol 97-4; CC Docket No. 96-98

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, are an original and twelve copies of comments on the above-referenced petition. As directed in the March 14, 1997, Public Notice, copies of these comments are also being sent to Janice Myles, Common Carrier Bureau, and ITS, Inc., as indicated in the attached Certificate of Service.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

Jacqueline E. Davis

Jacqueline E. Davis

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	File No. CCBPol 97-4;
Petition of MCI for Declaratory Ruling	)	CC Docket No. 96-98

COMMENTS OF SBC COMMUNICATIONS INC., SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL AND NEVADA BELL

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April 15, 1997

SUMMARY

SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (the "Companies") oppose the Petition for Declaratory Ruling filed by MCI. The Commission should recognize that intellectual property rights of third parties are implicated by CLECs' use of unbundled network elements. But it should accommodate those rights by requiring that CLECs obtain any necessary licenses to use such intellectual property directly from the third party owners. For reasons of law and practical necessity, the Commission must reject MCI's proposal to require ILECs to seek such licenses on behalf of CLECs.

The Companies present as an attachment to their Comments an Affidavit prepared by Roger A. Milgrim, a renowned expert in intellectual property law and licensing. Mr. Milgrim explains the generally limited nature of intellectual property licenses, and concludes, based on a review of over 45 license agreements to which the Companies are parties, that the rights conveyed to the Companies from the third party owners of the intellectual property generally do not permit them to authorize CLECs to use the licensed intellectual property or to disclose confidential information to them. For CLECs to use third party software or gain access to third party confidential data without a direct license or authorization from the third party owner would constitute an infringement.

The Companies respond to each of the questions the Commission raised in its March 14 Notice in this proceeding. First, intellectual property is generally used in providing local exchange service. The Companies provide specific examples of the third party intellectual property rights licensed to them on a restricted basis in connection with their network facilities. Further, as a matter of law, the use of unbundled network elements by CLECs, without authorization from the third party owner, raises serious issues of violation or infringement of those rights.

Second, this issue arises in connection with the use of unbundled network elements other than switching features. The Companies provide examples of licensed software used in connection with such other elements.

Third, the issue arises with respect to CLEC access to unbundled network elements even if it is not implicated by ILEC provision of its own services for resale.

Finally, there are compelling legal and practical reasons that MCI's proposal to require ILECs to obtain rights on behalf of CLECs is completely untenable. Instead, the Commission should determine that the responsibility for obtaining any third party licenses or right-to-use agreements that might be necessary to allow CLEC use of unbundled network elements should be imposed on the CLECs themselves. Direct licensing is the only way to allow the particularized needs and interests of the CLECs to be properly accommodated. The burden, if any, of seeking direct licenses is not unreasonable.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	File No. CCBPol 97-4;
Petition of MCI for	)	CC Docket No. 96-98
Declaratory Ruling	)	

COMMENTS OF SBC COMMUNICATIONS INC., SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL AND NEVADA BELL

SBC Communications Inc. ("SBC"), Southwestern Bell Telephone Company ("SWBT"), Pacific Bell and Nevada Bell ("Pacific") (collectively "the Companies") file these Comments in response to the Public Notice released on March 14, 1997, in this proceeding (the "Notice"). As explained below, the relief MCI seeks in its Petition for Declaratory Ruling ("Petition") should be denied. The Commission should determine that the intellectual property rights of third parties cannot be ignored or overridden, and competing local exchange carriers ("CLECs") seeking to use unbundled network elements should be expected and required to obtain all third-party intellectual property rights that are necessary for their own service offerings and network configurations.

The proper treatment and licensing of third party intellectual property rights is a matter that should be resolved directly among the affected parties, not by Commission rule. At most, the Commission should consider adopting a neutral measure that would facilitate the private resolution of such third party rights in accordance with the precepts of intellectual property law.

INTRODUCTION

Intellectual property is invariably used in providing local exchange (and interexchange) services. The assembly and operation of a network or parts of a network involves equipment, software and data that are subject to protection under copyright, patent, and trade secret law. These areas of law deal principally with intangible rights, such as the right to use equipment or software rather than the physical objects themselves. Since infringements of intellectual property rights can result in substantial liability, a local exchange carrier cannot ignore intellectual property rights implicated by its business plans and its network configuration and operation.

MCI is a sophisticated interexchange carrier and CLEC, and has developed and licensed intellectual property rights for its own use for many years. Its request that incumbent LECs ("ILECs") be made responsible for negotiating on its behalf with third parties to acquire intellectual property rights that are needed for its use of the ILECs' network elements is unjustifiable under the law.

The Companies respond below to each of the four specific questions the Commission posed in its Notice, as well as to arguments made by MCI in its Petition.

1. INTELLECTUAL PROPERTY RIGHTS OF THIRD PARTIES ARE IMPLICATED WHEN CLECS USE ILECS' UNBUNDLED NETWORK ELEMENTS.

The networks that the Companies and other ILECs have developed incorporate intellectual property that has been licensed from third parties. For the reasons explained below, the use by CLECs of unbundled network elements incorporating such intellectual property, if unauthorized by the third party owner, is a potential infringement of those intellectual property rights.

A. Intellectual Property Rights Allow an Owner to Exclude All Unauthorized Uses.

Attached to these Comments as Exhibit A is an Affidavit of Roger M. Milgrim, a renowned expert in intellectual property law and author of leading treatises on trade secrets law and intellectual property licensing. In that Affidavit, Mr. Milgrim describes basic principles of intellectual property law and licensing, and describes how they apply to the issues raised here.

Intellectual property rights are generally protected under federal and state law. See Milgrim Aff. at ¶ 10 and Appendix B. The essence of intellectual property protection is the owner's exclusive right to prevent the unauthorized use or disclosure of the protected property. Milgrim Aff. at ¶ 7. Intellectual property law thus deals with such things as intangible rights of use or dissemination rather than physical ownership of the tangible objects in which the intellectual property is embodied. The rights of use are typically authorized by means of a license or other right to use agreement. Id. at ¶¶ 8-9.

The rights themselves are divisible, often characterized as a "bundle" of rights, each of which can be conveyed or licensed separately. For example, the owner of a copyright in computer software can grant licenses that are limited by territory (e.g., use in Texas or use in North America), by time (e.g., use for one year), or by type of use (e.g., use on one computer, use on a network, copying for distribution, or copying for incorporation into new software). The owner can license on an exclusive or a non-exclusive basis, and can license the intellectual property for the licensee's own business use or can grant a right to sublicense others. See Milgrim Aff. at ¶¶ 12-15. As a general matter, the only rights conveyed in a license agreement are those that are expressly granted.

The three principal types of intellectual property involved in the issue raised before the Commission are copyrights, patents, and trade secrets. The principal similarities and differences among the legal attributes of these three species of intellectual property are described in Appendix B to Mr. Milgrim's Affidavit. In brief compass, they are as follows:

Copyrights. Copyright protection is provided under the Copyright Act, 17 U.S.C. §§101 *et seq*. A work is protectible upon being created and "fixed" in a tangible medium of expression. Making an unauthorized copy of a work can be an infringement, whether or not the infringer knew that the copying was unlawful. The statutory penalties for infringement are intended to make it costlier to infringe than to license use of the work. Liability can be imposed on parties other than a direct infringer under theories of contributory infringement, where the defendant makes available the instrumentalities for another's infringing activity, and vicarious liability, where the defendant has control over the infringer and stands to profit by the infringing activity.

Patents. Patent protection is similarly controlled by federal statute. 35 U.S.C. §§ 1 *et seq.* By contrast with copyright, however, the scope of protection against unauthorized use is specified by the terms of the claims of the issued patent. Thus, determining whether there is potential infringement requires a close examination of the particular patents at issue and the nature of the use. Methods or processes can be subject to patent protection, so that while use of particular equipment in one way may raise no patent issues, use of the same equipment in another way or in connection with other equipment or systems can infringe. See Milgrim Aff. at ¶ 16. Liability for inducing or contributing to an infringement can be imposed if the defendant provides material for use by another practicing a patented process, with knowledge that the intended use will infringe a known patent. Id.

Trade Secrets. Protection of trade secrets is well established in state statutes and the common law. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002, 1004 & n.9 (1984). A trade secret comprises information, including systems or databases, that has value for a business and is protected as a secret by its owner. Trade secrets can be conveyed to other parties, such as employees and licensees, pursuant to confidentiality agreements that maintain their secrecy vis-a-vis competitors and other parties not in privity with the owner. Unprotected or unlimited disclosure destroys the trade secret by destroying its secrecy. Whether a trade secret can continue to be afforded legal protection after disclosure depends on the nature of the information and the circumstances under which it has been disclosed.

B. Providing Access to Unbundled Network Elements Implicates the Intellectual Property Rights of Third Parties.

The Commission asks whether intellectual property rights are implicated in the provision of access to unbundled network elements. This question has two parts: whether third parties' intellectual property is actually present in the network elements, and whether the use of those elements by CLECs raises potential infringement issues.

(1). Intellectual property licensed from others is an integral part of the Companies' networks. The Companies' networks are made up of equipment, software, and systems that are subject to third parties' intellectual property rights. Originally, the Companies, like the other Bell Operating Companies, received licenses under patents owned by AT&T and its subsidiaries at the time of divestiture. In addition, the Companies were licensed to use copyrighted software and confidential information used as part of the Bell System, including software code and technical data. As the Companies have continued to develop and modernize their networks, they have acquired new equipment and systems that have also required licenses or right-to-use agreements.

For example, switches purchased from a variety of vendors encompass both hardware and the software necessary to operate the switch as part of a network. The vendor may hold patents in the equipment as well as the software, may hold copyrights in the software as well as in manuals and other documentation, and may hold trade secrets in the technical data and software necessary to operate the switch.

The vendors sell the switches to the Companies pursuant to contracts that typically include a license agreement or a grant of rights of use covering the intellectual property embedded in the equipment as it is intended to be used. Following are descriptions of provisions in three vendor contracts[1] entered by SWBT:

- A current switching system contract grants SWBT a non-exclusive license to use the software, but (1) states that there is no transfer of title to any of the software under the agreement, (2) permits copying of software and related documentation only for "archival or emergency purposes" or for "internal use," (3) requires SWBT to hold the software in confidence, (4) permits transfer of the right to use the software for no additional fee, but only to an affiliated company of SWBT, (5) imposes nondisclosure obligations with respect to confidential information (to which only SWBT and its affiliates are authorized to have access), and (6) states that "[n]o licenses, express or implied, under any patents are granted" by the vendor to SWBT.

- Another large switching vendor similarly grants SWBT a non-exclusive right to use software, states that no patent licenses are granted, and requires SWBT to keep its information in confidence.

[1] The contracts discussed in these Comments are generally marked as "Restricted - Proprietary Information" and "not for general distribution." The substance of the relevant clauses is described here, without disclosure of any proprietary information.

The agreement prohibits assignment of any rights without the written consent of the vendor, and provides that in the case of a transfer of the equipment, the license may only be transferred if the transferee separately signs an agreement with the vendor undertaking to comply with the same confidentiality and non-disclosure provisions that are applicable to SWBT. The vendor also warrants the intellectual property contained within its system, but expressly excludes any obligation to hold SWBT harmless from infringement liability if the material it provides is combined with any other software or apparatus. The agreement also provides in connection with software rights that the vendor "will aid [SWBT] in obtaining licenses for any information not owned by [the vendor]."

- In a contract for software used in connection with an automatic dialing feature, the vendor specifically reserves ownership of the copyrights, trade secrets, patents and trademarks associated with the software. SWBT obtained a nonexclusive and non-transferable right to use the software on specific equipment. The contract states that SWBT has no further rights. The vendor warrants that the software systems will not infringe third party intellectual property rights, but not when the claim of violation arises in part from the use of the system in combination with software, hardware or data not recommended or supplied by the vendor or from its use other than as instructed by the vendor. The entire software system, including all information associated with it, is a trade secret, and SWBT is obligated not to disclose it (i.e., not to permit access to it by any third party). SWBT is barred from assigning the agreement other than to a wholly owned subsidiary, and from assigning, transferring, or subcontracting any of its rights under the agreement.

Restrictive language from numerous additional contracts is reviewed and described in Appendix C to the Affidavit of Roger Milgrim. Mr. Milgrim concludes, based on his review of over 45 SWBT and Pacific vendor license agreements, that many of those contracts do not permit the sublicensing of intellectual property rights, or the granting of access to the licensors' software, to CLECs. Milgrim Aff. at ¶ 17.

Some of the Companies' vendor agreements do not prohibit use of the licensed intellectual property by others. Id. Where that is the case, and no separate license or right of use agreement is necessary, the issues raised by MCI's Petition are moot. But where the Companies do not hold, and hence cannot convey, the rights that a CLEC needs to operate a network element as part of its own service offering, serious intellectual property issues arise.

(2). The use by a CLEC of unbundled network elements that exceeded the rights conferred on SWBT by third party intellectual property owners would raise potential infringement questions. The Commission has held that when a CLEC acquires access to an unbundled network element, it will in effect "purchase the right to obtain exclusive access to an entire facility, or use of some feature, function or capability of that element." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15631 at ¶ 258 (1996) ("First Report and Order"). After purchasing access to an unbundled network facility, the CLEC "is entitled to exclusive use of that facility for a period of time." Id. at 15635 ¶ 268.

MCI emphasizes that title to the unbundled network element does not pass to the CLEC, and the ILEC remains in physical control of its network. Petition at 7. But intellectual property rights are separate from the physical hardware or copies of software in which they are embodied. Indeed, some of SWBT's contracts with vendors specify that title to the software remains with the vendor, but a license is still necessary for SWBT to use that software.

Courts recognize this distinction in the software copyright area. In MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), cert. dism., 510 U.S. 1033 (1994), for example, a manufacturer that sold computers and licensed the software to operate them sued a company that had been performing maintenance on those computers. The software had been licensed to computer purchasers for their own internal use, and they had agreed to keep the software confidential. Id. at 517 n. 3. While it was clear that the customers could turn on and operate the computers under their license agreements, the Court of Appeals found that when the defendant turned on and operated the same computers in the course of performing maintenance, it engaged in unlawful copying (by automatically loading the software to RAM) because it had not been authorized to do so. Id. at 518-19. Even though title to and physical control of the equipment did not pass to the maintenance company, its unauthorized operation of the machines, albeit for a limited purpose and under contract with their licensed owners, was an infringing act under the copyright law. While other courts could reach different conclusions, depending on the facts and circumstances presented in a particular case, the use of software other than in the manner expressly authorized in the applicable license agreement creates a risk of serious repercussions, including termination of the license and liability for infringement or contributory infringement.

In the same way, the use by a CLEC of a network element that depends on software that has been provided under a limited license would also be an infringing act unless it is authorized by the copyright owner.

Moreover, the use by a CLEC of unbundled network elements in conjunction with its own equipment, software, or systems can present serious patent infringement risks that can be neither anticipated nor prevented by the Companies. CLECs will use unbundled elements as part of their own network, meeting their own design and functional requirements. Their intellectual property needs necessarily derive from that design and those functions. Additionally, CLECs do not disclose their system designs or business plans to the Companies in the course of ordering network elements. The Companies thus have no way of knowing whether the CLECs' use of those elements would, because of the effect of combining them with unknown others, result in an infringement of patent rights of third parties other than the Companies or any of their vendors. If the combination of elements or method of performing a network function constitutes the practicing of a method as to which a patent has issued to a third party, and the CLEC has neglected to acquire a license to do so, it may violate intellectual property rights that could not have been licensed by the Companies. Indeed, some of the Companies' vendor agreements disclaim any intellectual property warranty in just such a circumstance.

This example illustrates as well the principle that the intellectual property rights implicated by a CLEC's use of network elements may be rights the Companies neither need themselves nor could have anticipated the CLEC's needing. In these circumstances, as discussed below, it would be impossible to impose on ILECs the obligation of acquiring intellectual property rights needed by CLECs.

Finally, CLEC use of network elements may also violate rights in trade secrets. The Companies' vendor contracts generally treat software, underlying computer source code, and other information as confidential, and prohibit disclosure to or access by third parties. Milgrim Aff. at ¶ 20. To the extent use of unbundled network elements would involve access to such information, its unrestricted disclosure to a CLEC could imperil the owner's trade secret property interest. Id. at ¶21. In order to avoid such an outcome, the CLEC must enter an agreement directly with the owner of the intellectual property, undertaking to treat the information or data as confidential and not to disclose it to others.

2. PROVIDING ACCESS TO NETWORK ELEMENTS OTHER THAN SWITCHES IMPLICATES THE SAME KINDS OF INTELLECTUAL PROPERTY RIGHTS.

The Commission next asks whether the provision of network elements other than access to vertical features of unbundled switches raises similar issues. Because other network elements also involve software and systems, the answer is yes.

In fact, the entire telecommunications network is built upon intellectual property rights, from a variety of vendors. The signaling system network, for example, is software driven, and involves other patent and trade secret rights. Most elements of that system are operated pursuant to license agreements with a number of different vendors.

Similarly, the local loop includes hardware and software used for aggregating multiple transmissions on the local loop, and for diagnostic and control functions. SWBT has acquired such equipment under a contract that provides a "non-exclusive, non-transferable, license to use the software," and prohibits the software from being copied for distribution to others. As with switching, a CLEC that acquires exclusive use of such facilities from SWBT may, unless authorized by the third party owner of the intellectual property, engage in an act of infringement by operating the software features, and could engage in patent infringement if it used the software in an unauthorized method in conjunction with its own monitoring and control systems.

The Commission itself has acknowledged that intellectual property rights with regard to particular unbundled elements may best be resolved in proceedings that address the specific facts. In its discussion of call-related databases in the First Report and Order, the Commission stated that ILECs may bring concerns about intellectual property rights with respect to specific databases to the attention of the states in the arbitration process, and that the states may then "take action to limit unnecessary access to proprietary information." 11 FCC Rcd at 15744-45 ¶ 490. The framework adopted by the Texas PUC, which MCI describes (See Petition at 4 & n.2), follows a similar approach, in that it allows intellectual property issues that arise with respect to a CLEC's particular proposed offering to be dealt with in the specific context of the rights actually implicated.

3. PROVIDING SERVICES FOR RESALE DOES NOT RAISE THE SAME INTELLECTUAL PROPERTY CONCERNS.

The Commission asks whether providing "access to services for resale" under Section 251 of the Act also implicates third party intellectual property rights. As the Commission noted in the First Report and Order, resale generally does not present the same types of issues. 11 FCC Rcd at 15710, ¶ 419 at n. 935.

When an ILEC sells services to a CLEC for resale, the ILEC is engaging in the use of its network facilities for which they were originally acquired and intended -- providing communications services. The ILEC controls the services, determines which services to offer, and warrants the quality of the services.[2]

When, by contrast, the ILEC provides access to unbundled network elements, the requesting carrier controls the service offering. The services offered by the CLEC using the ILEC's network facilities may not even be services the ILEC can provide or chooses to provide. Indeed, the CLEC may be

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[2] There may be contractually-imposed restrictions on resale, but such restrictions do not typically arise by operation of the intellectual property laws alone. Since the date of the First Report & Order, SWBT has been notified of a few discrete limitations on resale. For example, one such limitation precludes the resale of voice-activated dialing outside SWBT's five-state region.

offering services that are proprietary to itself, using network elements of its own or that it has acquired from other sources.

The Commission recognized this difference in requiring that ILECs offer the functionalities of a switch, not simply the right to purchase service features at wholesale rates. First Report and Order, 11 FCC Rcd at 15712 ¶ 422. As it explained, unbundled network access permits the CLEC to acquire "exclusive use" of a facility for a period of time. Id. at 15635 ¶ 268. This ability to purchase unbundled elements, it emphasized, allows CLECs to offer different services and packages of services than the ILEC offers. Id. at 15667-68 ¶¶332, 333. But because the CLEC buys exclusive access to the network element outright, it also bears a risk that it may not recover the price of the element because there will be insufficient demand for those services. Id. at 15668 ¶334. Thus there is a fundamental distinction between a CLEC's resale of an ILEC's services and a CLEC's use of unbundled network elements to provide services of its own.

The MAI case discussed above recognizes just such a distinction for copyright purposes as well. The operation of the plaintiff's computers with their software was completely legal when done by the original purchaser, since that was the purpose of the license agreement. But when an unauthorized party turned on the computer instead, an infringement occurred. Here, the Companies' contracts with third party owners of intellectual property allow them to use the software and equipment to provide local exchange services, but generally do not expressly authorize other carriers to use that software and equipment to provide services of their own.

It is impossible, given the legal imperatives and the factual complexities involved, for the Commission to make an authoritative declaration that no intellectual property rights of any third parties are potentially infringed when CLECs use unbundled network elements (see Petition at 7). More importantly, the Commission does not have jurisdiction to determine intellectual property rights. See TelePrompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 406 & n.11 (1974). Nor does it have the authority to grant a compulsory license in derogation of independently established intellectual property rights, or to expropriate intellectual property without just compensation.

4. COMPETING CARRIERS SHOULD BE REQUIRED TO CLEAR DIRECTLY ANY THIRD PARTY INTELLECTUAL PROPERTY RIGHTS THEY MAY NEED IN ORDER TO PROVIDE THE SERVICES THEY WILL OFFER.

As a routine part of entering the local exchange business, CLECs must obtain rights or permissions from a variety of parties other than the ILEC. For example, a CLEC must presumably obtain an authorization from the state or local government to do business in the jurisdiction, must lease or otherwise acquire office space, and must acquire office equipment and software to operate its business. To the extent the CLEC will use network elements of its own as part of its anticipated service offering (as is presumably the case with carriers such as MCI), it must also acquire equipment and negotiate licenses or right to use agreements that cover any intellectual property encompassed within the elements it will provide itself. In short, the CLEC must identify and evaluate all rights and permissions it will need to engage in business as it has planned. As with all other businesses, a CLEC ignores potential intellectual property rights at its own peril.

The same principle applies to the acquisition of unbundled network elements from an ILEC. With respect to some network elements, in the particular configuration contemplated by a particular CLEC, no third party intellectual property rights may be implicated at all, or the license to the ILEC may expressly permit use by others. In those cases, the CLEC can obtain access to network elements along with whatever rights the ILEC has to offer, and can proceed without more to offer local exchange service.

In other circumstances, the ILEC may not have been granted the right to authorize others to use or have access to the third party's intellectual property. In those cases, the ILEC can convey everything it has the right to convey, but the CLEC must still acquire authorization from the third party owner to use or gain access to the intellectual property embedded in the network element. This is not an impediment imposed by the ILEC, but rather stems from the conventional operation of the intellectual property laws as reflected in conventional license agreements in general use for many years. If the CLEC uses the intellectual property without being authorized to do so by the owner, it risks infringement liability.

The Companies are concerned that unauthorized use by a CLEC may create a risk of potential liability for them as well. Under both copyright law and patent law, as described above, a party may be held liable in certain cases of direct infringements by others, under theories of contributory infringement or vicarious liability. Because the business plans of CLECs are not known to the Companies, they cannot determine the extent of any such potential liability when a CLEC uses their unbundled network elements. It was for this reason that SWBT requested a provision in its access and interconnection agreements that required each CLEC to obtain licenses or right to use agreements (if needed), to demonstrate that it had done so, and to indemnify SWBT against liability resulting from any infringement of third parties' intellectual property rights. See Petition at 3-4 nn 1, 2.

A. Requiring CLECs to Obtain Necessary Licenses Is Not an Undue Burden.

The Commission asks whether a requirement that CLECs obtain necessary intellectual property licenses imposes any burdens on them, and whether there are ways of reducing such burdens.

First, such a requirement would impose no more of a burden upon the CLECs than is typically imposed upon any other entity seeking to use the intellectual property of another. The scope and nature of any intellectual property rights that might be required are determined by the CLEC's particular business plan and, like other aspects of its business, may require negotiation of a license or right-to-use agreement in order to avoid potential liability.

Second, to the extent licenses are available at no charge or at mutually agreed prices, there would be no undue economic burden associated with obtaining them. MCI engages in wholly unsupported speculation about a supposed "strong possibility" that ILECs would pressure third parties to refuse to extend licenses to CLECs or to delay the grant of licenses. Petition at 5-6. This speculation is, however, nonsense. The Companies' vendors are in the business of authorizing the use of their products by carriers. Indeed, MCI and other CLECs are presumably large customers of those vendors in their own right. Rather than speculating that third party intellectual property owners will delay or refuse licensing, it is more reasonable to expect that they will promptly negotiate licenses at reasonable prices. If anything, the economic incentives could well involve lower fees, since the use to be authorized is incremental additional use of equipment and software already sold by the vendor. See Milgrim Aff. at ¶¶ 24-26.

If the Commission is nonetheless concerned that there is some potential burden associated with a CLEC's acquiring the necessary licenses, it may wish to consider a measure adopted by the Texas PUC in its arbitration determination regarding this issue, to facilitate the process for CLECs and